Respectfully submitted,

PAUL TURLEY
Counsel for Respondent Baldwin
2431 Fillmore St.
San Francisco, CA 94115

KATE WELLS
Counsel for Respondent Chacko
2600 Fresno Street
Santa Cruz, California 95062

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No. 05-587

IN THE

Supreme Court of the United States

MARK REED,

Petitioner,

v.

MICHAEL BALDWIN,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

DAVID K. HUSKEY, ESQ.
Lead Counsel for Mark Reed
Placer County Counsel's Office
175 Fulweiler Avenue
Auburn, CA 95814
Telephone: (530) 889-4044

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PETITIONER'S REPLY BRIEF

The repeated failure of the Ninth Circuit to determine "clearly established" law at the appropriate level of particularity places peace officers in the Ninth Circuit at risk of civil trials that should be barred by the qualified immunity of good faith. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). In this case, the Ninth Circuit's overbroad application of precedent to find a "clearly established" right "to be free from battery by gun-wielding officers," thereby denying

qualified immunity to Petitioner Reed, conflicts directly with *Saucier* and *Brosseau v. Haugen*, 543 U.S. 194; 160 L.Ed.2d 583 (2004). In both *Saucier* and *Brosseau*, this Court reversed the Ninth Circuit for failure to determine "clearly established" law in a more "particularized" sense. *Brosseau*, 160 L.Ed. 2d at 599; *Saucier*, 533 U.S. at 200. The Ninth Circuit appears to be unique in its refusal to follow this Court's precedent with respect to the second inquiry in determining qualified immunity in Fourth Amendment excessive force cases, and, as in *Brosseau*, its decision in this case in clearly erroneous.

SHOULD THIS COURT REQUIRE LOWER COURTS TO ALWAYS DECIDE THE FIRST QUESTION IN QUALIFIED IMMUNITY ANALYSIS?

Of course, the first inquiry in determining whether qualified immunity applies in the context of alleged excessive force by a peace officer is whether the conduct violated the Fourth Amendment rights of the plaintiff. Whether or not this inquiry should always proceed before deciding the second inquiry was decided in *Saucier*, but then questioned by a concurrence in *Brosseau*, 160 L.Ed.2d at 591 (Justices Breyer, Scalia and Ginsberg). Justice Stevens has also questioned this procedural requirement in *Bunting v. Mellon*, 541 U. S. 1019 (2004).

Whether or not the facts in this case constitute a violation of the Fourth Amendment is a close question that, like many other close questions, could lead to unnecessary constitutional pronouncements by the lower courts where qualified immunity is clearly available. See Justice Breyer's concurrence in *Brosseau*, 542 U.S. at 591. To continue this practice of requiring lower courts to decide close

constitutional questions based on specific factual scenarios before deciding potentially easier questions of clearly established law, may result in a series of published district court and circuit court opinions establishing specific police procedures. However, having the lower courts establish police procedure that officers in the field must apply in situations, like this one, where they must make "split-second judgments - - in circumstances that are tense, uncertain and rapidly evolving" may lead to the hesitancy to act that the qualified immunity was intended to prevent. *Graham v. Connor*, 490 U.S. 386, 397 (1986). This petition for certiorari further presents the Court an opportunity to revisit its position, questioned by four Justices, on this ongoing procedural controversy.

RESPONDENT MAKES THE FUNDAMENTAL ERROR OF RELYING UPON 20-20 HINDSIGHT TO ARGUE THAT REED APPLIED THE FORCE IN QUESTION AFTER THE HOME WAS "SECURE"

Respondent argues that Petitioner Reed should have known that committing a battery with a weapon upon a cooperative suspect was clearly unlawful because of *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984). Respondent attempts to harmonize *McKenzie* with the facts of this case by asserting that here too the battery occurred after the officers had "secured" the battered person. Respondent and the Ninth Circuit see no difference between force directed at a suspect cooperating with an officer prior to handcuffing (this case) and force directed at a suspect wearing handcuffs (*McKenzie*).

Perhaps there is none from the perspective of a dentist, but there is a significant difference from the perspective of an objectively reasonable officer searching a home before all occupants have been located and handcuffed. It does not require an expert in police procedure to know that if a suspect chooses to resist before he or she is handcuffed, the suspect presents a significantly greater threat to the officer than that suspect would present if he or she resisted while wearing handcuffs. Common sense should also suffice to inform respondent and the Ninth Circuit of the potential dangers presented to an officer responsible for performing a search of a home for illegal drugs by an unhandcuffed home owner, who, an officer could reasonably believe, knows where knives, screw-drivers, bats, scissors, and other potentially lethal weapons including guns are located within the home.

Although Mr. Baldwin was on the ground and Officer Reed had a knee on his back, Mr. Baldwin was not handcuffed when Officer Reed allegedly put a gun to the back of his head. From the perspective of an objectively reasonable officer mindful of officer safety issues, almost handcuffed is not handcuffed. At that moment, Officer Reed had no way of knowing Mr. Baldwin's skills or lack thereof in hand-to-hand fighting. Although we now know that Mr. Baldwin never attempted to fight, that after acquired knowledge does not retroactively eliminate the risk to Deputy Reed that Mr. Baldwin might have chosen to fight during the seconds before being handcuffed.

After Deputy Reed handcuffed Mr. Baldwin, thereby significantly diminishing Mr. Baldwin's ability to resist effectively, petitioner agrees that a battery with a gun would violate the Fourth Amendment. That obvious proposition is what *McKenzie* held in 1984. In trivializing the risks

presented to Officer Reed in the seconds before he handcuffed Mr. Baldwin, respondent and the Ninth Circuit err by failing to consider the situation from perspective of an objectively reasonable officer initiating a residential search for illegal drugs. *Graham*, 490 U.S. at 396-397.

THE BATTERY HERE IN QUESTION WAS NOT EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT

The force employed by Deputy Reed in this case was not disproportionate to the risk he faced. Deputy Reed did not strike Mr. Baldwin with the gun, did not shoot the gun, and did not make any verbal threats about shooting the gun. Deputy Reed was not physically rough with Mr. Baldwin and did not verbally threaten or abuse him. Mr. Baldwin suffered no physical harm. The only force at issue in this case is Mr. Baldwin's allegation that Deputy Reed placed a gun to the back of his head for approximately 20 seconds, causing fright and anxiety. Deputy Reed then holstered his gun and handcuffed Mr. Baldwin.

Mr. Baldwin was the first occupant of the home encountered by Deputy Reed after having entered the residence. At that time, Deputy Reed had no way of knowing who else might be present in the Baldwin home. Certainly, he would not want to holster his weapon until he was confident that no other occupant was approaching him. Rather than immediately take his focus off of the surrounding areas to handcuff Mr. Baldwin, an objectively reasonable officer could keep his focus on approaches to the room while straddling Mr. Baldwin, who was lying face down on the floor. Certainly, a reasonable officer in the position of Deputy Reed would not want to be surprised by

some other potentially hostile occupant while his attention was momentarily diverted to handcuffing Mr. Baldwin.

While taking that short interval (20 to 30 seconds) to see that no other occupant was coming to that location prior to putting away his weapon and handcuffing Mr. Baldwin, and to ensure that Mr. Baldwin did not choose that time to resist, an objectively reasonable officer could have put a gun to the back of Mr. Baldwin's head to take "unquestioned command" of the situation. *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981). Certainly, there is no clear case law cited by the Ninth Circuit or to this Court to inform officers that such conduct under similar facts is excessive force. An objectively reasonable officer might not have considered the placing of a gun to the back of Mr. Baldwin's head substantially more threatening than pointing a gun at Mr. Baldwin's head or body, either of which can be excessive force if occurring without any justification. See *Robinson v. County of Solano*, 278 F.3d 1007, 1014-1015, *Turmon v. Jones*, 402 F.3d 202, 207-208 (4th Cir. 2005), *McKenzie*, 738 F.2d at 1010-1011. Whether pointing a gun at a suspect where the suspect can see it to gain compliance is more terrifying than placing a gun to the back of the suspect's head is a subjective judgment. Is it more frightening to see the barrel than to feel it?

In contrast to *Robinson*, *Turmon*, and *McKenzie*, however, here Petitioner Reed's alleged force was justified by the risks inherent in performing a drug search before the suspects and the residence are secured. Once assured that no more occupants may be approaching his position, an objectively reasonable officer in the position of Deputy Reed would then holster his weapon and handcuff Mr. Baldwin.

Petitioner is not arguing that police officers ought to use these tactics during residential searches for drugs, that better tactics do not exist, or that there should be a per se rule that under all circumstances putting guns to the heads of persons before they are handcuffed is acceptable force. However, under these facts, petitioner should not have to stand trial for an alleged violation of the Fourth Amendment that can be objectively justified, that caused no physical harm, that only marginally increased, if at all, the emotional distress inherent when police search a home for drugs with guns drawn and pointed at the occupants (presumably even more stressful where, as here, substantial quantities of marijuana are present in the home), and that can be easily fabricated by any person who takes umbrage at being ordered to the ground and handcuffed by a peace officer.

CLEARLY ESTABLISHED LAW DID NOT INFORM PETITIONER REED THAT THE CONDUCT ALLEGED AGAINST HIM IN THIS CASE COULD VIOLATE THE CONSTITUTION

The Ninth Circuit and respondent rely upon one case, *McKenzie*, as a basis for the "clearly established law" governing the outcome of this case. As discussed above and in the Petition, the facts of *McKenzie* differ too much from the facts of this case for it inform Deputy Reed of the probable outcome litigation over the force alleged by Mr. Baldwin.

Moreover, the principle of "clearly established law" articulated by the Ninth Circuit in this case, the supposed right to be "free from battery by gun-wielding officers," is woefully overbroad. Taken at face value, that would mean that an officer could never put a knee on the back of a suspect lying on the floor without first holstering his or her

gun, or could not handle a suspect without first holstering his or her gun.

While perhaps a close call as to whether or not the conduct complained of by Baldwin violates the Fourth Amendment, no cases clearly informed Deputy Reed that the conduct alleged against him here was unconstitutional. At worst, Petitioner Reed's alleged conduct falls within the "sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. 194, 206 (2001)

CONCLUSION

For the same reasons that the petition for certiorari was granted in *Brosseau*, it should also be granted here. Deputy Reed has suffered the identical harm in being denied the qualified immunity by the Ninth Circuit for the same improper reason as occurred in *Brosseau*. The Ninth Circuit has again frustrated the purpose of qualified immunity as applied to peace officers by formulating "clearly established law" at a level of generality that ensures that peace officers will be subjected to civil trials for conduct that case law has not reasonably informed them might potentially subject them to liability.

Respectfully submitted,

David K. Huskey
Lead Counsel
Placer County Counsel's Office
175 Fulweiler Avenue
Auburn, CA 95603

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